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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

DAVID DAWSON,

*vs.*

*Petitioner,*

DELAWARE,

*Respondent.*

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF DELAWARE

## BRIEF OF AMERICAN CIVIL LIBERTIES UNION, ACLU OF DELAWARE, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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21 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii

BRIEF IN SUPPORT OF PETITIONER ..... 1

STATEMENT ..... 2

INTEREST OF *AMICI* ..... 2

SUMMARY OF ARGUMENT ..... 3

ARGUMENT ..... 4

THE FIRST AND FOURTEENTH AMENDMENTS BAR THE STATE FROM USING A DEFENDANT'S BELIEFS AND ASSOCIATIONS—UNRELATED TO ANY CONDUCT—AS A BASIS FOR IMPOSING THE DEATH PENALTY

CONCLUSION ..... 16

TABLE OF AUTHORITIES

Page

*American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) ..... 7

*Aptheker v. Secretary of State*, 378 U.S. 500 (1964) ..... 7

*Baldwin v. Alabama*, 472 U.S. 372 (1985) ..... 5

*Bates v. City of Little Rock*, 361 U.S. 516 (1960) ..... 7

*Brandenburg v. Ohio*, 395 U.S. 444 (1969) ..... 4, 7, 8

*Caldwell v. Mississippi*, 472 U.S. 320 (1985) ..... 13

*Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978) ..... 7

*DeJonge v. Oregon*, 299 U.S. 353 (1937) ..... 7

*Employment Division, Department of Human Resources v. Smith*, 110 S. Ct. 1595 (1990) ..... 7, 13

*Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963) ..... 7

*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) ..... 13

*Godfrey v. Georgia*, 446 U.S. 420 (1980) ..... 13

*Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) ..... 14

*Lankford v. Idaho*, 59 U.S.L.W. 4434 (U.S. May 20, 1991) ..... 12, 14



TABLE OF AUTHORITIES – Continued

Page

*NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) ..... 7

*Noto v. United States*, 367 U.S. 290 (1961) ..... 8

*Police Department v. Mosley*, 408 U.S. 92 (1972) ..... 7

*Roberts v. United States Jaycees*, 468 U.S. 609 (1984) ..... 7

*Scales v. United States*, 367 U.S. 203 (1961) ..... 8

*Terminiello v. City of Chicago*, 337 U.S. 1 (1949) ..... 13

*Thomas v. Collins*, 323 U.S. 516 (1945) ..... 7

*United States v. Bakker*, 925 F.2d 728 (4th Cir. 1991) ..... 12

*United States v. Bangert*, 645 F.2d 1297 (8th Cir.), *cert. denied*, 454 U.S. 860 (1981) ..... 5

*United States v. Lee*, 455 U.S. 252 (1982) ..... 13

*United States v. Lemon*, 723 F.2d 922 (D.C. Cir. 1983) ... 5, 8, 15

*West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) ..... 12

*Zant v. Stephens*, 462 U.S. 862 (1983) ..... 4

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DAVID DAWSON,

*Petitioner,*

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**On Writ Of Certiorari**
**To The Supreme Court Of Delaware**

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# BRIEF OF AMERICAN CIVIL LIBERTIES UNION, ACLU OF DELAWARE, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## STATEMENT

The American Civil Liberties Union, the ACLU of Delaware, and the National Association of Criminal Defense Lawyers submit this brief, *amici curiae*, urging reversal of the decision below. This brief is submitted upon the written consents of counsel for both petitioner and respondent, which are submitted herewith. (The originals of respondent's consent were sent directly to the Court.)

## INTEREST OF *AMICI*

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan, nonprofit organization with nearly 300,000 members dedicated to preserving the principles of individual liberty embodied in the Constitution. The ACLU of Delaware is one of its statewide affiliates. Since its founding more than 70 years ago, the ACLU has consistently taken the position that the right to hold unpopular views is protected by the First Amendment and that such unpopular views cannot, by themselves, be outlawed or punished. This case once again involves that core principle of constitutional law and thus raises issues of central concern to the ACLU.

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit corporation with a membership comprised of more than 5,000 lawyers and 25,000 affiliate members, including representatives of every state. NACDL was founded 25 years ago to promote study and research in the field of criminal defense law, to disseminate and advance knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence, and expertise of defense lawyers. Among NACDL's stated objectives is promoting the proper administration of criminal justice. Consequently, NACDL concerns itself with the protection of individual rights and the improvement of criminal law, its practices and procedures. Those concerns are directly implicated by this case.



## SUMMARY OF ARGUMENT

In seeking the death sentence during the penalty phase of David Dawson's murder trial, the State of Delaware presented and emphasized to the jury evidence which purportedly proved that Dawson was an adherent of the Aryan Brotherhood, a "white racist prison gang," and that he had satanic religious beliefs. Dawson's associations and beliefs are protected by the First Amendment. The State conceded that these beliefs and associations had no relationship to the murder, to Dawson's prior criminal convictions, or to any other "bad act" attributable to Dawson. The State's only justification for presenting such evidence as an "aggravating" factor warranting the death penalty was that it supposedly established Dawson's bad "character." The State expressly argued that certain beliefs were "good" while Dawson's beliefs were "bad."

The First and Fourteenth Amendments prohibit the basing of punishment on one's beliefs or associations unrelated to any actual or threatened conduct. Weakening that basic constitutional principle would severely chill the free exercise of First Amendment rights, since no one can be sure that his or her beliefs or associations will not be viewed by a jury as offensive or generally indicative of "bad character." The State's labeling of beliefs as "good" or "bad" thus violated the First Amendment. It was also an unrestrained appeal to the jury's passions and prejudices, in direct contravention of the constitutional limitations imposed by this Court on the capital-sentencing process.

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## ARGUMENT

### THE FIRST AND FOURTEENTH AMENDMENTS BAR THE STATE FROM USING A DEFENDANT'S BELIEFS AND ASSOCIATIONS—UNRELATED TO ANY CONDUCT—AS A BASIS FOR IMPOSING THE DEATH PENALTY

The State sought and obtained a death sentence based upon evidence of David Dawson's constitutionally protected beliefs and associations as an "aggravating" circumstance, even though the State conceded that those beliefs and associations were unrelated to Dawson's crime or any other prior bad acts or conduct (and indeed without proof that any *other* member of the group he supposedly joined had committed or advocated any crimes or bad acts). In its zeal to obtain a death sentence at any cost, the State expressly argued to the jury that some beliefs were better than others, and that Dawson's beliefs justified increasing his punishment from life imprisonment to death. The State's action in seeking "to punish mere advocacy and . . . assembly with others," *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969), was a clear violation of the First and Fourteenth Amendments.

This Court has already made it clear that mere advocacy and other activity protected by the First Amendment may not be treated as an "aggravating" circumstance in capital cases. As the Court observed in *Zant v. Stephens*, 462 U.S. 862 (1983), an "aggravating" circumstance will be invalid if it "authorizes a jury to draw adverse inferences from conduct that is constitutionally protected"—*e.g.*, "the display of a red flag" or "the expression of unpopular political views." *Id.* at 885. Thus, a sentencing procedure will be struck down if it has "attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process,



such as for example the race, religion, or political affiliation of the defendant . . . ." *Id.* Dawson's beliefs and associations fall within these categories of protected First Amendment activities.[1]

The State argued that Dawson deserved the death penalty because of his bad character, as evidenced not by any acts or propensities or psychological characteristics, but merely by certain opinions he held about race and religion. Dawson supposedly viewed himself as a member of a white racist group, the Aryan Brotherhood. However, there was no evidence that racism motivated Dawson's crime or any other conduct.[2] There was also no evidence that the Aryan Brotherhood itself engages in illegal acts or has illegal objectives, much less that Dawson sought to further any of its acts or objectives. In addition, Dawson supposedly held satanic religious beliefs, as manifested by his occasional use of the nickname "Abbadon," a demonic reference he also exhibited as a tattoo. Again, there was no evidence that Dawson's religious beliefs motivated his crime or any other conduct. This was the extent of the State's proof as to these nonstatutory "aggravating" factors.

Moreover, the State's "proof" of Dawson's beliefs and associations was highly speculative. While the State referred to Dawson's

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[1] *See also Baldwin v. Alabama*, 472 U.S. 372, 382 (1985); *United States v. Lemon*, 723 F.2d 922, 938 (D.C. Cir. 1983) ("A sentence based to any degree on activity or beliefs protected by the first amendment is constitutionally invalid"); *United States v. Bangert*, 645 F.2d 1297, 1308 (8th Cir.) ("Consideration of political beliefs, as distinguished from criminal activity, would clearly be impermissible in determining defendants' sentences, because it would impair the rights of the defendants under the First Amendment, protecting public expression of their political beliefs, by words and symbols"), *cert. denied*, 454 U.S. 860 (1981).

[2] Dawson's victim, Mrs. Kisner, was white, as is Dawson.

tattoos, belt buckle, and some of his reading materials (see Joint App. pp. 35-36), it presented no concrete evidence of Dawson's beliefs or of his actual membership in the Aryan Brotherhood, conceding to the trial judge that Dawson's membership could not be positively established: "[T]he State doesn't see it as particularly necessary to show that the defendant has undergone some right [*sic*] of initiation into this group." (Joint App. p. 37.) Despite this, the State flatly told the jury in its opening statement at the penalty hearing: "You will hear evidence that the defendant *is a member* of the Aryan Brotherhood." (Joint App. p. 62) (emphasis added).

Nor was there any evidence that the Aryan Brotherhood had acted illegally in the Delaware prison system. The State offered an expert on *federal* prisons who would have testified that the Aryan Brotherhood is separate from state to state; he admittedly knew nothing about the group in Delaware.[3]

Under the First Amendment, no government agency may prohibit or punish the advocacy of beliefs, however pernicious. The

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[3] As the prosecutor conceded: "He is not familiar with the Delaware off-shoot of the Aryan Brotherhood . . . . He doesn't know about the Delaware chapter, so he can't tell us what the Delaware chapter does . . . . What he can tell us, just like he was going to describe Christianity. He can tell us what all Christians believe in . . . ." (Joint App. pp. 34, 46.) This testimony was subsequently withdrawn in favor of a stipulation regarding the Aryan Brotherhood, which was read to the jury and stated in its entirety:

> "The Aryan Brotherhood refers to a white racist prison gang that began in the 1960s in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware." (Joint App. p. 84.)

The jury was told nothing more about the Aryan Brotherhood's beliefs or activities.



Ku Klux Klan may propagate its ideas of racial supremacy. *Brandenburg v. Ohio, supra.* Nazis may proclaim their anti-Semitic beliefs in marches through Jewish neighborhoods. *Collin v. Smith,* 578 F.2d 1197 (7th Cir.), *cert. denied,* 439 U.S. 916 (1978). Communists may speak and run for office. *DeJonge v. Oregon,* 299 U.S. 353 (1937). Pornographers may degrade women in graphic, non-obscene, sexually explicit publications. *American Booksellers Ass'n, Inc. v. Hudnut,* 771 F.2d 323 (7th Cir. 1985), *aff'd,* 475 U.S. 1001 (1986). However offensive or subversive, such speech is protected under our constitutional system. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department v. Mosley,* 408 U.S. 92, 95 (1972). *See also Employment Division, Department of Human Resources v. Smith,* 110 S. Ct. 1595, 1599 (1990) (the government may not "punish the expression of religious doctrines it believes to be false . . . , impose special disabilities on the basis of religious views or religious status . . . , or lend its power to one or the other side in controversies over religious authority or dogma") (citations omitted).

The First Amendment also protects the individual's right to join groups and associate with others holding similar beliefs. *See, e.g., Aptheker v. Secretary of State,* 378 U.S. 500, 507 (1964); *Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539, 543 (1963); *Bates v. City of Little Rock,* 361 U.S. 516, 522-23 (1960); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460-61 (1958). "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." *DeJonge, supra,* 299 U.S. at 364. *See Thomas v. Collins,* 323 U.S. 516, 530 (1945). "An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts v. United States Jaycees,* 468 U.S. 609, 622 (1984). The First Amendment "demands extraordinary safeguards whenever the state

would use against an individual his association with others on the basis of shared beliefs. This is particularly true when those beliefs place the group outside the mainstream of our society and beyond the sympathies and perhaps even the comprehension of the average citizen." *United States v. Lemon*, 723 F.2d 922, 943 (D.C. Cir. 1983) (holding that such associations may not be used as a basis for sentencing).

This Court has repeatedly upheld the right of association even if the group advocates illegal activity, unless there is proof beyond a reasonable doubt that the defendant specifically sought to carry out the group's illegal objective. *See, e.g., Scales v. United States*, 367 U.S. 203, 229 (1961); *Noto v. United States*, 367 U.S. 290, 299-300 (1961). The First Amendment draws a firm distinction between "mere advocacy" on the one hand and "incitement to imminent lawless action" on the other; only the latter may be proscribed. *Brandenburg, supra*, 395 U.S. at 449 n.4.[4]

Thus, even if a group has been shown to engage in illegal activities, courts "must guard against any attempt to spread the taint of illegality throughout the association, for that is the beginning of persecution." *United States v. Lemon, supra*, 723 F.2d at 943. Mere membership in the group may not be made a crime *or* made a basis for harsher punishment, without establishing that the defendant himself actually sought to further illegal conduct. *Id.* at 939-40.

In the present case, there was no proof that any past or "imminent" lawless action was motivated by Dawson's beliefs or

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[4] Of course, no question is presented here concerning the right of government officials to control the assembly of groups within prisons. There was no proof that Dawson's alleged membership in the Aryan Brotherhood was related in any way to his record of prison disciplinary violations.



affiliations. In fact, at an *in limine* hearing at the start of his trial, the State repeatedly admitted that it could not relate Dawson's beliefs and associations to any acts, criminal or otherwise, by Dawson himself or by anyone else associated with the Delaware Aryan Brotherhood:

> "The State can't produce an expert who can tell us that David Dawson holds this particular belief *or David Dawson acts upon this particular belief.* What we seek to introduce is some understanding of what David Dawson ascribes to himself, the label Aryan Brotherhood, and we will produce ample testimony on that point. That is as to on his hands, the clothing that he wears, correspondence that he keeps and so forth." (Joint App. pp. 34-35) (emphasis added).

* * *

> "We don't see it as particularly important whether the defendant has, in fact, killed in order to gain access to the Aryan Brotherhood or has, in fact, committed a violent escape in order to get in, or has killed another inmate to get in or so forth. But the fact that he ascribes to that general set of ideals . . . ." (Joint App. p. 35.)

* * *

> "In other words, we are looking at the character of this man, David Dawson, and not only things that he does. We know some of the things he does. They will be explained by his prison record and this killing itself, but some of the things he believes in now or ascribes to. Whether he actually has killed in prison isn't important. *What is important is for the jury to understand this is what he is into. This is his character. His character is he thinks the Aryan Brotherhood is a really neat organiza-*

*tion and he believes in the things that they believe in. He wears their tattoo. He wears their belt. He carries their literature, he paints his wall and so forth.*" (Joint App. pp. 37-38) (emphasis added).

* * *

"*We don't think it is important that whether he acted or not acted [sic] on his membership in this group*—what we think is important is that that is the kind of thing that he ascribes to. That is his character. He thinks that the Aryan Brotherhood is an organization that he wishes to align himself with." (Joint App. pp. 48-49) (emphasis added).

* * *

Dawson's racist and satanic beliefs, and his alleged association with the Aryan Brotherhood, were never introduced in the guilt phase of his trial. This was appropriate because they were completely irrelevant to the crime with which he was charged. They were introduced at the penalty phase, under the guise of "character" evidence, solely for the purpose of increasing his punishment.

The prosecutor's arguments in favor of admitting this evidence highlight the violation of basic First Amendment principles. The State expressly argued that Dawson's racial and religious beliefs were relevant "to whether or not the death penalty ought to be imposed." (Joint App. p. 11.) The State described the Aryan Brotherhood as having "other than laudable goals," in contrast to Christianity, which it described as a "good religion." (Joint App. p. 42.) The State's categorization of religions as "good" or "bad" is repugnant to the First Amendment.



These assertions were amplified in the prosecutor's arguments to the jury. After describing the Aryan Brotherhood as "a white racist prison gang," the prosecutor continued:

> "Could have joined the JC's [*sic*] in prison. Could have gotten his GED. Could have done something good. What does he become? An Aryan brother. What does that say about his character and propensities?" (Joint App. p. 105.)

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"Where is going to AA compare with proclaiming yourself an Aryan brother? Where does abstinence of alcohol, where does temperance range in his list of priorities compared to associating himself with a racist gang?" (Joint App. p. 106.)

* * *

> "Where does the love of [a] half sister who sees him two or three times a month weigh against the real David Dawson who 7 days a week, 35 [*sic*] weeks a year is Aryan brother David Dawson, is Abbadon?" (Joint App. p. 107.)

Beliefs and associations unrelated to any bad acts lie at the protected core of the First Amendment. The State may not ask a jury to consider the exercise of First Amendment rights as a basis for

imposing the death penalty. Indeed, any such attempt can only be seen as an effort to inflame the jury and thereby undermine the constitutional integrity and fairness of the capital-sentencing process.[5] It is not for the State to develop a hierarchy of associations, in which the Jaycees rank high and the Aryan Brotherhood ranks low; in which Alcoholics Anonymous ranks high, but the Aryan Brotherhood ranks so low as to counteract it; in which adherence to Christianity, a "good religion," is praiseworthy, but those who believe in satanism should be put to death.[6]

There is no room in our constitutional system for a prosecutor to denounce beliefs and associations protected by the First Amendment as a factor justifying the death penalty. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Nor may any jury consider such matters in fixing punishment. The First Amendment leaves to each individual the evaluation of beliefs. "However pernicious an opinion may seem, we depend for its correction not on the conscience of

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[5] *Cf. Lankford v. Idaho*, 59 U.S.L.W. 4434, 4438 (U.S. May 20, 1991) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion") (citations omitted).

[6] Even in the non-capital context, the sentencing authority, whether judge or jury, may not inject its own religious or political views into the sentencing decision. *See United States v. Bakker*, 925 F.2d 728, 740-41 (4th Cir. 1991) (sentencing procedures are invalid if they "create the perception" that sentencers are sitting on "a pulpit from which [they] announce their personal sense of religiosity and simultaneously punish defendants for offending it").



judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). This Court therefore has been vigilant against the "standardization of ideas either by legislatures, courts, or dominant political or community groups." *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949). The State simply may not engage in "the unacceptable 'business of evaluating the relative merits of differing religious claims.'" *Employment Division v. Smith, supra*, 110 S. Ct. at 1604, *quoting United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring).

Furthermore, this Court has repeatedly held that in seeking the death penalty, the State may not appeal to the jury's passions or prejudices through an unguided exercise of discretion. The State "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance.'" *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion) (footnotes omitted).[7] That principle, established under the Eighth and Fourteenth Amendments, can never be obeyed when the State seeks to use beliefs as an "aggravating" factor, because any attempt to give the jury the necessary "guidelines" for determining "good" or "bad" beliefs (whether such "guidelines" are provided by the prosecutor, the judge, or the legislature) will necessarily violate the co-equal First Amendment principle that the government must remain ever neutral in the

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[7] *See also Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985) (the jury's discretion must be guided because of the "heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case'").

marketplace of ideas. *See, e.g., Hustler Magazine v. Falwell,* 485 U.S. 46, 56 (1988). Dawson's case presents a vivid illustration of the State's failure to adhere to either constitutional principle, and its violation of both.[8]

Finally, excluding from consideration this narrow category of evidence—a defendant's beliefs and associations unrelated to any conduct—will not impair the legitimate efforts of prosecutors to obtain the maximum penalty when appropriate. Under the First Amendment, the State remains free to present a wide range of other character evidence to justify increased punishment, including the defendant's psychological state, prior criminal record, and other conduct-related evidence.[9]

On the other hand, if this limited category of evidence concerning associations and beliefs is *not* excluded, the chilling effects on the free exercise of First Amendment rights will be devastating. Each of us will have to fear that our beliefs or associations—even if they are

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[8] Similarly, besides having to give the jury clear guidelines as to the proper grounds for imposing the death penalty, the government must give each defendant clear advance notice that his or her conduct may be scrutinized as the basis for a death sentence. *Cf. Lankford v. Idaho, supra,* 59 U.S.L.W at 4438. Again, the State cannot include beliefs and associations in any such notification (*e.g.*, by listing them in advance as statutory "aggravating" factors) without violating the neutrality required by the First Amendment.

[9] We do not comment on whether the introduction of such evidence is proper under other constitutional provisions or under state law, as those issues are not before the Court.



considered popular or "mainstream" here and now—could be viewed in some other place or time as a basis for increased punishment, even death. Indeed, as a matter of First Amendment law, there is no distinction between using beliefs as a basis to increase punishment and using them to define an underlying offense. *See, e.g., United States v. Lemon, supra,* 723 F.2d at 937-38. Both involve the criminalization of beliefs, and both are constitutionally prohibited.

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## CONCLUSION

A court may not punish an individual by imposing a heavier sentence based on his exercise of First Amendment rights. Beliefs that do not meet the approval of a prosecutor or a jury are not punishable by death. Since the jury was not only permitted, but in fact encouraged, to consider the exercise of First Amendment rights as a basis for imposing the death penalty, the judgment below should be reversed, and the matter remanded for a new sentencing hearing in compliance with constitutional requirements.

Respectfully submitted,

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